IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

AUTOMATED FACILITIES MANAGEMENT CORPORATION and TANGOPOINT.COM, INC.

Plaintiffs,

v.

EMAINT ENTERPRISES, LLC; ZOHO CORP.; THINKAGE, LTD.; MICROMAIN CORP.; SERVICE MANAGEMENT SYSTEMS, INC.; VERMONT SYSTEMS, INC.; ACCELA, INC.; and ENFOTECH,

Defendants.

No. 8:09-cv-00390-JFB-TDT

ACCELA'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITIVE STATEMENT

I. INTRODUCTION

Accela's inclusion in this lawsuit appears to be part of a shotgun prosecution attempt aimed at eight different defendants, from multiple jurisdictions, who all allegedly infringe the same three patents. While Plaintiffs' 35-page complaint is full of redundant conclusory allegations, it contains only a single reference to Accela's alleged infringing product—the purported "Accela Advantage." That product, however, does not exist. Accela does not now make and has never made such a product.

Plaintiffs' prosecution of their complaint has been similarly remiss. Plaintiffs' filed their complaint in October 2009, but they did not serve Accela until nearly a month *after* the 120-day statutory service time had expired. That ground alone is sufficient to warrant dismissal of Plaintiffs' claims against Accela.

The lack of personal jurisdiction in this matter is also grounds for dismissal. Accela is a California company with no offices or employees located in Nebraska, and the complaint is devoid of any substantive allegations concerning Accela's specific contact within this forum. Indeed, in the last ten (10) years, Accela has only had two contracts with Nebraska residents and neither contract is at issue in this case. Accela's gross revenues attributable to Nebraska customers is miniscule—less than one-half of one percent.

Because the complaint was not properly served within the requisite timeframe and the exercise of jurisdiction as to Accela would not comport with fairness and due process, Accela respectfully moves that all claims against it be dismissed. In the event Plaintiffs are allowed to proceed with any claim against Accela, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, Accela requests a more definitive statement of the alleged infringing product because the currently alleged product (*i.e.*, "Accela Advantage") does not exist.

II. STATEMENT OF FACTS

Plaintiffs filed their complaint in this action on October 28, 2009. (Complaint, Filing Number ("Filing No.") 1.) According to the complaint, Plaintiff Automated Facilities Management Corporation is a corporation doing business in Texas, and Plaintiff TangoPoint.com is a corporation doing business in Nebraska. (*Id.* ¶¶ 3-4.) Accela is a California corporation with its corporate headquarters in San Ramon, California. (Declaration of Colin Samuels in Support of Motion to Dismiss, Ex. 1 of the Evidence Index filed herewith ("Index Ex. 1"), ¶ 3.) Plaintiffs did not serve Accela until March 23, 2010, nearly five (5) months after the complaint was filed. (*Id.* ¶ 6 & Ex. A.)

With respect to Accela, Plaintiffs' complaint contains few substantive paragraphs alleging facts related to their patent infringement claim. (Complaint, Filing No. 1, ¶¶ 11, 31.) As relevant to this motion, Plaintiffs allege that "Accela does substantial business in Nebraska and has advertised, offered for sale and sold infringing product in the State of

Nebraska, in this Judicial District" (*id.* ¶ 11) and that "Accela Advantage" is "a system for managing operational facilities . . . ." (*id.* ¶ 31.) No other references to an Accela product or a proper basis for personal jurisdiction are set forth in the complaint. (Filing No. 1.)

III. ARGUMENT

A. PLAINTIFFS' FAILURE TO COMPLY WITH RULE 4 TRIGGERS IMMEDIATE DISMISSAL.

Under Rule 4(m) of the Federal Rules of Civil Procedure, if a plaintiff does not serve a defendant with process within 120 days of the filing of the complaint, the court must dismiss the action against the defendant unless the plaintiff can show good cause. Fed. R. Civ. P. 4(m).

The complaint in this case was filed by Plaintiffs on October 28, 2009. (Complaint, Filing No. 1.) All defendants should have been served no later than February 25, 2010—120 days later. Plaintiffs did not serve Accela until March 23, 2010. (Index Ex. 1, ¶ 6 and Ex. A.) Because Plaintiffs did not serve Accela with process within 120 days of filing their complaint, service was insufficient and the claims against Accela should be dismissed under Rules 4(m) and 12(b)(5).

In view of the above, Accela respectfully requests that the Court dismiss Plaintiffs' claims against it and dismiss Accela from this action.

B. ACCELA IS NOT SUBJECT TO PERSONAL JURISDICTION IN NEBRASKA.

1. Legal Standard

In a patent case, personal jurisdiction is determined by the law of the Federal Circuit. *Inamed Corp v. Kuzmak*, 249 F.3d 1356, 1359 (Fed. Cir. 2001); *Vishay Dale Elecs., Inc. v. Cyntec Co.*, No. 8:07-cv-191, 2008 WL 281686, at *2 (D. Neb. Jan. 29, 2008) (Bataillon, C.J.). Where the forum's long-arm statute has been construed to permit jurisdiction to the extent of constitutional limits, as Nebraska's has, the court engages in "a single inquiry: whether jurisdiction comports with due process." *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1017 (Fed. Cir. 2009); *HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1307 (Fed. Cir. 1999) (Nebraska long-arm statute co-extensive with limits of due process). Thus, the inquiry here is whether Accela has the necessary minimum contacts with Nebraska such that this Court may exercise either "general" or "specific" jurisdiction without offending "traditional notions of fair play and substantial justice." *See Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1329-30 (Fed. Cir. 2008) ("*Avocent*"). Here, Accela does not have the necessary minimum contacts to support either form of personal jurisdiction. Plaintiffs cannot meet their burden to show otherwise. *See Vishay Dale Elecs.*, 2008 WL 281686, at * 2.

2. Accela is not subject to general jurisdiction.

Accela is not subject to general jurisdiction because it does not have "contacts with the forum state that qualify as '*continuous and systematic* general business contacts.'" *Campbell Pet Co. v. Miale*, 542 F.3d 879, 883 (Fed. Cir. 2008). Accela owns no real property in Nebraska, it does not maintain an office in Nebraska, it is not registered to do business in Nebraska, it has no agents or employees located in Nebraska, it has no bank accounts in Nebraska, and its agents do not regularly travel to Nebraska. (Index Ex. 1, ¶ 3.) In the last ten (10) years, Accela has only been party to *two* agreements with Nebraska companies. (Declaration of Diane Jankiewicz in Support of Motion to Dismiss, Ex. 2 of the Evidence Index filed herewith ("Index Ex. 2"), ¶¶ 3, 6-8.) The revenue generated from these agreements is minimal, accounting for less than one-half of one percent of Accela's gross revenues in 2009. (*Id.* ¶¶ 6-7; Index Ex. 1, ¶ 4.)

Under well-established case law, these circumstances are insufficient to establish general jurisdiction over Accela. For example, in *Autogenomics, Inc.*, 566 F.3d at 1014-18, the court held that defendant company's contacts with California were not "continuous and systematic" even where it sent two company representatives to California to negotiate a contract, entered into ten license agreements with California companies, attended three trade shows over five years in California, and made about 1% of its sales to California residents. Similarly, in *Campbell Pet Co.*, 542 F.3d 883-84, the court upheld the district court's determination that general jurisdiction was not proper where defendant company had made only twelve sales over eight years to customers in Washington, did not direct its website to customers in Washington or generate any sales to Washington customers through the website, and generated approximately 2% of its total sales from Washington. Thus, the facts here, like those in *Autogenomics* and *Campbell Pet*, do not meet the high threshold required to exercise general jurisdiction over a defendant. *See, e.g.*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (finding no general jurisdiction where defendant's contacts with Texas consisted of sending its CEO there for contract negotiations; accepting into its New York bank account checks drawn on a Texas bank; buying helicopters, equipment, and training services from a Texas company for substantial sums; and sending its personnel to the helicopter company's facilities in Texas for training).

Like the defendant in *Campbell Pet*, Accela's website cannot support a finding that general jurisdiction is proper. Accela's website is not specifically directed to customers in Nebraska and is primarily informational. (Index Ex. 1, ¶ 3(i).) Because Accela's website is equally available to "all customers throughout the country who have access to the Internet," it does not demonstrate "a persistent course of conduct" in Nebraska to establish personal jurisdiction. *See Trintec Indus. v. Pedre Promotional Prods.*, 395 F.3d 1275, 1281 (Fed.

Cir. 2005); *Xactware, Inc. v. Symbility Solution Inc.*, 402 F. Supp. 2d 1359, 1365-66 (D. Utah 2005) (defendant's "moderately interactive" website was not expressly aimed at Utah residents and therefore could not establish general jurisdiction).

3. Accela is not subject to specific jurisdiction.

In the absence of general jurisdiction, Plaintiffs must satisfy a three-part specific jurisdiction test. Plaintiffs must show that (1) Accela "purposefully directed" its activities at residents of Nebraska, (2) Plaintiffs' claims "arise out of or relate to" Accela's activities in Nebraska, and (3) upon a proper showing by defendant, that personal jurisdiction under these circumstances would be "reasonable and fair." *See Avocent*, 552 F.3d at 1332; *HollyAnne Corp.*, 199 F.3d at 1307-08.

Accela, however, has not purposefully directed sufficient activity toward Nebraska residents. As detailed in the declaration of Mr. Samuels, Accela has no office or employees in Nebraska, it is not registered to do business in Nebraska and its agents do not regularly travel to Nebraska. (Index Ex. 1, ¶ 3.) Accela has only two current contacts with Nebraska and those contacts are generally limited to the maintenance of customers' products remotely from California. (Index Ex. 2, ¶¶ 3-4, 8.) Accela's website is not directed at Nebraska residents and it does not even provide direct web-sale option (Index Ex. 1, ¶ 3(i)); thus, the website is not a meaningful contact in this inquiry. *See, e.g., Ductcap Prods. v. J & S Fabrication*, No. 09-1179, 2009 WL 3242022 (D. Minn. Oct. 2, 2009) (defendant's website was not "specifically directed at Minnesota customers," did not generate any Minnesota sales, and therefore did not support first factor of specific-jurisdiction test).

Plaintiffs' complaint does not show, as it must to satisfy a specific jurisdiction allegation, that Accela made, licensed, used, offered to sell, or sold *the alleged patented inventions at issue* in Nebraska. *See* 35 U.S.C. § 271(a); *HollyAnne Corp.*, 199 F.3d at

1308. As noted above, Plaintiffs have not alleged a product that exists or that Accela actually makes. (Index Ex. 1, ¶ 5.)

Even if Plaintiffs could amend their pleading to show that Accela's two Nebraska customers are using an allegedly infringing product, "it would be unreasonable for the forum to assert jurisdiction under all the facts and circumstances, [and thus] due process requires that jurisdiction be denied." *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1568 (Fed. Cir. 1994). Here, Nebraska's interest in providing a forum for the claims against Accela is insubstantial because no Nebraska state law is involved, no Nebraska corporation is involved, and only Plaintiff TangoPoint.com maintains any kind of physical presence here. (*See* Complaint, Filing No. 1.) Further, Accela, as a California company with no employees in this forum, would be substantially, and unnecessarily, burdened by litigating this issue in Nebraska, when all of the documents and witnesses that Accela would produce concerning its products are located in California.

Accordingly, personal jurisdiction over Accela—either general or specific—is not supported by these facts, and the Court should dismiss Plaintiffs' complaint against Accela for lack of personal jurisdiction.

C. PLAINTIFFS' COMPLAINT FAILS TO IDENTIFY A PRODUCT MADE, SOLD OR OFFERED BY ACCELA.

In the event the Court permits Plaintiffs to proceed in pursuing their claims against Accela, Plaintiffs should be compelled to amend their complaint to identify an accused product made, sold or offered by Accela, if any.

Federal Rule of Civil Procedure 12(e) provides that "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." "[I]n applying Rule 12(e) the court must take into consideration the nature and complexity of the suit."

United States v. Schine Chain Theatres, 1 F.R.D. 205, 208 (W.D.N.Y. 1940). As to any patent infringement case, "the plaintiff must provide facts that 'outline or adumbrate' a viable claim for relief, not mere boilerplate sketching out the elements of a cause of action." *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (in context of Rule 8(a)(2) and 12(b)(6) motion to dismiss).

The purpose of Rule 12(e) is to ensure that the defendant has reasonable notice of the claims, and knowing what product is at issue in this case is critical to Accela's ability to understand and assess the claims. Only two paragraphs of Plaintiffs' 35-page complaint provide any substantive information specific to Accela (as opposed to extensive boilerplate allegations), and *nowhere* in the complaint do Plaintiffs identify any product that Accela actually manufactures, uses, offers for sale or licenses. (*Compare* (Complaint, Filing No. 1 at ¶ 31) *to* (Index Ex. 1, ¶ 5).) While Plaintiffs' reference to an "Accela Advantage" system appears to be their attempt to identify the accused product (Complaint, Filing No. 1, ¶ 31), Accela does not make, use, offer for sale, sell, or license any such product. (Index Ex. 1, ¶ 5.)

Plaintiffs' complaint alleges that each of three patents is infringed by eight different defendants, which are based in seven different jurisdictions. Yet not a single particular patent claim in any of the three patents is identified as being infringed by any specific product. *Ondeo Nalco Co. v. EKA Chems., Inc.*, Case No. Civ. A. 01-537-SLR, 2002 WL 1458853 at *1-2 (D. Del. June 10, 2002) (counterclaims for patent infringement dismissed under Rule 8(a) for being "too vague to provide plaintiff with fair notice of which products are accused of infringing defendant's patents"). As Plaintiffs have brought a complex matter before this Court, Plaintiffs should be required to amend their complaint to provide a more definite statement regarding any Accela product that they have a good faith basis for asserting infringes any patent at issue. At a minimum, Plaintiffs should be required to identify one claim in each asserted patent that is allegedly infringed by a particularly identified Accela product, which product identification should include specific modules that are required to support any alleged infringement (since many Accela products have different modules from which customers can select which particular modules to license). *See* Index Ex. 1, ¶ 5.

Accela should not be required to guess as to which Accela product, if any, Plaintiffs believe should be at issue in this litigation. If the Court does not sustain Accela's Motion to dismiss, Plaintiffs should be ordered to make more definite the factual allegations upon which they rely.

IV. CONCLUSION

Plaintiffs failed to serve their complaint within the time required by Rule 4(m). Plaintiffs' complaint fails to allege facts sufficient to warrant personal jurisdiction over Accela in Nebraska, thus warranting dismissal under Rule 12(b)(2). Alternatively, the complaint is so vague as to the accused product Accela cannot reasonably frame a responsive pleading. Consequently, Accela's Motion should be granted.

Dated this 13th day of May, 2010.

ACCELA, INC., Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2010 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which sent notification of such electronic filing to the following:

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